



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of:           Tel-Med Information Systems  
File:                B-225655  
Date:                June 2, 1987

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### DIGEST

1. "Equal" bid in response to brand name or equal solicitation was properly rejected as nonresponsive where inadequate descriptive material was submitted to establish that offered item met the salient characteristics listed in the solicitation.
2. Protest basis concerning an alleged solicitation impropriety, raised approximately 5 months after bid opening, is untimely and not for consideration on the merits.
3. Bidder submitting nonresponsive bid is considered an interested party under Bid Protest Regulations to raise the argument that the awardee, a bidder offering a higher price, submitted a bid which is nonresponsive for similar reasons.
4. Where an agency solicits a brand name or equal product, the agency may specify characteristics that go beyond those of the designated brand name product when those characteristics represent the essential needs of the agency. In such cases, where, in effect, a modified brand name product is required, a procuring agency must reject the brand name product if it does not show compliance with, or takes exception to, the modified salient characteristics.

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### DECISION

Tel-Med Information Systems protests the rejection of its low bid and the award of a contract to Apec Technology Ltd. under invitation for bids (IFB) No. CO-25-86, issued by the Immigration and Naturalization Service (INS) for the procurement of two automatic multi-line disc telephone answering systems.

We deny the protest in part, dismiss it in part, and sustain it in part.

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The IFB, issued on a brand name or equal basis, specified "Apec's Multi-line disc systems, model MLDS-4-50" or equal, and listed 20 required salient characteristics that both the brand name or equal systems were required to meet, including one or more characteristics that exceeded the capabilities of the brand name product. The brand name or equal clause in the IFB provided that bids offering equal products could be considered for award if the products were clearly identified in the bids and the bidders provided sufficient descriptive materials so that the government could determine that the offered products met all the required salient characteristics. In addition, the IFB contained the standard descriptive literature clause which stated that the failure of descriptive literature to show that the product offered conformed to the requirements of the IFB would require rejection of the bid. See Federal Acquisition Regulation, 48 C.F.R. § 52.214-21 (1985).

Four bids were received at bid opening on August 18, 1986. Two bidders, including Apec, offered the brand name system, and Tel-Med and one other bidder offered "equal" telephone answering systems.

Tel-Med's low bid was evaluated to determine whether its offered product, Teledata Center (TMTC), Model 3010, evidenced compliance with all of the required salient characteristics specified in the IFB. Tel-Med's bid was rejected as nonresponsive because, although Tel-Med provided a blanket statement that it can and will meet all of the salient characteristics, its bid did not clearly demonstrate its responsiveness to the requirements. Award was made on December 19, 1986, to Apec which offered the Apec model MLDS-4-50, the brand name system.

Tel-Med contends that its offered system meets or exceeds all of the requirements of the IFB and its bid clearly stated this. Tel-Med argues, therefore, that as the low responsive and responsible bidder, it is entitled to the award.

When products are offered on an "equal" basis in response to a brand name or equal solicitation, the products must conform to the salient characteristics of the brand name equipment listed in the solicitation. See, e.g., Andrew Corp., et al., B-217024, Mar. 25, 1985, 85-1 C.P.D. ¶ 344. It is not enough that the bidder believes its product is functionally equal to--or even better than--the brand name product. Wayne Kerr Inc., B-217528, Apr. 18, 1985, 85-1 C.P.D. ¶ 445. Rather, the bidder must submit with its bid sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets the specified salient characteristics. A blanket offer to meet all

the specifications does not satisfy this requirement. Rocky Mountain Trading Co., B-221060, Jan. 24, 1986, 86-1 C.P.D. ¶ 88. If the descriptive literature or other information reasonably available to the contracting activity does not show compliance with all salient characteristics, the bid must be rejected. Dakota Woodworks, B-220806, Oct. 29, 1985, 85-2 C.P.D. ¶ 486.

INS found Tel-Med's bid to be nonresponsive because it failed to show compliance with 9 out of 20 of the required salient characteristics. For example, one of the required characteristics is that the telephone answering "system must be able to begin playing any message to any caller within two (2) seconds from the time of selection." INS states that Tel-Med's bid does not indicate compliance with this requirement but merely addresses the issue ambiguously by stating that all lines would "eventually be serviced within a reasonable period of time." According to INS, another example of Tel-Med's failure to evidence compliance with the stated salient characteristics concerns the offered systems' ability to handle as many as 30,000 calls per month. INS states that Tel-Med's bid makes no mention of this capability.

In regard to the two-second response time requirement, Tel-Med argues that all systems (such as Tel-Med's) that have Winchester disks load messages and initiate playing instantaneously after message selection is made. Concerning the 30,000 call per month capability, Tel-Med argues that all disk telephone answering systems use the same Winchester disk unit, and therefore all systems with ten lines, with 24 hours of operation and using the same message lengths, will have the same capacity of call handling.

Tel-Med has not shown that its bid's descriptive literature evidenced compliance with the above-mentioned salient characteristics. Instead, Tel-Med is merely attempting to explain, after bid opening, how its system complies with the IFB requirements. However, a bid is responsive only if it is an unequivocal offer to meet all of the material terms and conditions of an IFB, and it is well settled that a bidder may not explain the meaning of an apparently non-responsive bid after bid opening. Display Sciences, Inc., B-222425, July 9, 1986, 86-2 C.P.D. ¶ 49. We conclude that Tel-Med's bid did not evidence compliance with the salient characteristics and was properly rejected as nonresponsive. Since Tel-Med's bid was nonresponsive on this basis, it is not necessary for us to address the other bases on which Tel-Med's bid may be nonresponsive. G.A. Braun, Inc., B-216645, Feb. 21, 1985, 85-1 C.P.D. ¶ 218. Therefore, we deny this aspect of Tel-Med's protest.

Tel-Med, in conceding that its descriptive literature did not fully cover the specific language relating to the salient characteristics, argues that "electronic computer functions cannot be demonstrated with pencil and paper." Tel-Med contends that it offered INS system demonstrations and presentations (from April to August 1986), but INS "systematically rejected them, closing Tel-Med out of consideration."

INS rebuts Tel-Med's allegation by stating that INS contacted Tel-Med concerning the testing of Tel-Med's disk equipment. According to INS, Tel-Med indicated that it was in the process of manufacturing some disk equipment but the equipment was not yet available for testing.

Tel-Med's argument that it is impossible to demonstrate compliance with the IFB's requirements through the submission of a bid ("pencil and paper") is untimely and not for our consideration on the merits. Tel-Med's contention constitutes an allegation of an impropriety in the solicitation. Our Bid Protest Regulations require that protests based upon allegations of improprieties in a solicitation be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1986). Bids were opened on August 18, 1986. Therefore, Tel-Med's contentions that compliance with the IFB's requirements can not be demonstrated merely through the submission of a bid and that Tel-Med was not given the opportunity to demonstrate its equipment, filed 5 months after bid opening, are untimely. Unicom System, Inc., B-222601.4, Sept. 15, 1986, 86-2 C.P.D. ¶ 297.

Finally, Tel-Med argues that Apec's bid does not evidence compliance with the same salient characteristics as to which Tel-Med's bid was determined nonresponsive. Tel-Med argues that if its bid is nonresponsive for lack of adequate descriptive literature, so is Apec's.<sup>1/</sup> Tel-Med argues

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<sup>1/</sup>We note that in many cases a nonresponsive bidder (such as Tel-Med) is not an interested party under our Bid Protest Regulations (4 C.F.R. §§ 21.0(a) and 21.1(a)) to protest the acceptance of another contractor's bid. See, e.g., Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 C.P.D. ¶ 273; Oklahoma City University, B-216702.2, Jan. 22, 1985, 85-1 C.P.D. ¶ 80. However, we have held that a protester whose bid is viewed as nonresponsive should have the opportunity to have its complaint heard when the complaint is that a competitor's bid should also be viewed as nonresponsive for the same reason(s). See Raymond Corp., B-224577, Jan. 8, 1987, 87-1 C.P.D. ¶ 36; Dillingham Ship Repair, B-218653, Aug. 14, 1985, 85-2 C.P.D. ¶ 167. Since Tel-Med is arguing that Apec's descriptive literature also

that Apec's descriptive literature fails to explicitly state or prove that Apec's offered system meets salient characteristics Nos. 4, 6, 8, 10, 12, 13, 15, 18, the same ones in which INS found Tel-Med to be deficient.

We need not decide whether Apec's offer met the characteristics Tel-Med complains of, as we find Apec in its bid took clear exception to salient characteristic No. 20, requiring the system to be able to work in an unattended mode, handling both rotary and touch tone callers. Although Apec's cover letter states that its offered system is able to work in an unattended mode, handling both rotary and touch tone callers, the cover letter refers to descriptive literature (brochures) which indicate that accessing messages is automatically accomplished for touch tone callers only and that rotary dial calls must be "directed to selected personnel for operator assistance." Other descriptive literature provided by Apec with its bid indicates that automatic access of its system by rotary telephone callers may be possible, but "is dependent upon the central phone office of the telephone company." This dependence upon operators and the central phone office clearly is inconsistent with the unattended mode requirement.

We have recognized that where an agency solicits a brand name or equal product, the agency may specify characteristics that go beyond those of the designated brand name product when those characteristics represent the essential needs of the agency. Potomac Industrial Trucks, Inc., B-203119, Feb. 3, 1982, 82-1 C.P.D. ¶ 78; General Hydraulics Corp., B-181537, Aug. 30, 1974, 74-2 C.P.D. ¶ 133. In these cases, where, in effect, a modified brand name product is required, it is proper to reject a bid offering the brand name product which does not show conformance with or takes exception to the modified salient characteristics. Potomac Industrial Trucks, Inc., B-203119, *supra*. As stated above, a blanket offer of compliance is not enough to overcome descriptive literature which shows that the offered product does not meet the stated requirements. Rocky Mountain Trading Co., B-221060, *supra*. Therefore, Apec's bid should have been rejected for taking exception to the modified brand name requirement that the offered systems must be able to operate in the unattended mode with both touch tone and rotary dial phones even though Apec's cover letter indicated compliance with this requirement.

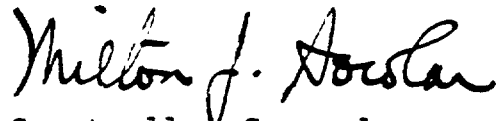
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was defective, we think it is appropriate to consider the merits of this allegation. Raymond Corp., B-224577, *supra*.

We have been advised that the two Apec systems under the base contract have been delivered, but not installed. We recommend that INS terminate Apec's contract, if feasible. If one of the other two remaining bidders is responsive, INS may award to that firm, if otherwise proper. If neither of the other bidders is responsive and otherwise eligible for award, INS should resolicit its needs.

Finally, although we sustain the protest in part, Tel-Med is not entitled to costs because its bid was properly determined to be nonresponsive and therefore it was not unreasonably excluded from the competition. See 4 C.F.R. §§ 21.6(d) and (e); Dillingham Ship Repair, B-218653, supra.

The protest is denied in part, dismissed in part, and sustained in part.

*for*   
Comptroller General  
of the United States